

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE**

STATE OF MISSOURI, *ex rel.* DAN)
COFFEY, et al.)
)
)
)
Relators,)
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v.)
)
CITY OF KANSAS CITY, MISSOURI,)
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)
Respondent,)
)
and)
)
KC HOTEL DEVELOPERS, LLC,)
)
)
Intervenor.)

**Case No. 1516-CV26565
Division 12**

**ORDER AND JUDGMENT DENYING RELATORS' PETITION FOR WRIT OF
MANDAMUS**

The Court having reviewed the Relators' Petition for Writ of Mandamus and Suggestions in Support, Respondent City of Kansas City, Missouri's Answer to Petition for Writ of Mandamus, Intervenor KC Hotel Developers, LLC's (hereinafter "KCHD") Answer, the attached exhibits presented, and after oral arguments from all counsel, and being fully advised in the premises the Court finds the following:

Introduction

Relators come before this Court seeking a permanent writ of mandamus ordering Respondent City of Kansas City, Missouri (hereinafter "Kansas City" or "City") to submit Relators' proposed ordinance to a vote of the City's electorate as dictated in §§ 702 and 703 of the City's Charter. The City disputes Relators' claims, stating among other things that the

proposed ordinance is unconstitutional on its face and therefore the City has no duty to place the ordinance before the voters.

Findings of Fact

The Court adopts the following findings of fact as set out by the parties in their *Joint Stipulation of Facts*, filed with this Court on January 29, 2016:

1. That Relators Dan Coffey, John Murphy, Alonzo Lane, Sandra Walker, and Tony Lowe are residents of Kansas City, Jackson County, Missouri, where at all times relevant to this case were registered to vote in the City's Municipal elections.
2. That the City is a Missouri municipal corporation, constitutional charter city under Mo. Const. Art. VI, § 19(a), and political subdivision of the State of Missouri located in the Missouri counties of Jackson, Clay, Platte, and Cass, with its principal place of government in Jackson County, Missouri.
3. That on May 21, 2015 the City Council adopted Committee Substitute for Ordinance No. 150357, authorizing the City Manager to execute a Memorandum of Understanding for a convention center hotel project proposed by Intervenor KCHD (hereinafter "the Project").
4. That on June 9, 2015 the City entered a Memorandum of Understanding (hereinafter "MOU") with KCHD to pursue the development of the Project, a related community improvement district, and public and private financing for the Project, including TIF and other public assistance.
5. That on July 23, 2015 the City Council adopted Committee Substitute for Ordinance No. 150597 approving a TIF plan, an urban renewal plan, a redevelopment area for each plan, related TIF redevelopment projects, the establishment of a community improvement district, appropriating \$35 million and other matters, all in relation to the project, and the City's entry into contracts effectuating those plans, the financing set forth in those plans, and the Project.

6. That on September 3, 2015, Relators, acting as a committee of petitioners under the City Charter, filed with the City's Clerk an initiative petition for a new ordinance titled "Petition for Initiative to Enact Restrictions on Developing, Financing, Constructing, and Operating Any Downtown Convention Center Headquarters Hotel" (hereinafter "the Petition").
7. That on September 15, 2015, after receiving notification from the relevant election authorities, the City Clerk certified to the Committee that the Petition was short of the number of signatures required.
8. That on September 22, 2015, within ten days of the certificate of insufficiency, the Committee filed supplemental signed copies of the Petition with the City Clerk.
9. That on September 24, 2015, the election authorities informed the City Clerk that, with the supplemental filing, the number of valid signatures on the Petition was now sufficient to meet the Charter's requirements.
10. That on September 25, 2015, the City Clerk issued the Committee a certificate that the number of valid signatures on the Petition is sufficient to meet the Charter's requirements.
11. That as of September 25, 2015, the Petition properly contains the signatures of electors of the City equal in number to at least five per cent of the total votes cast for candidates for the office of Mayor at the last preceding regular municipal election.
12. That the Petition meets the requirements contained in §§ 730 and 731 of the Charter of the City of Kansas City.
13. That on November 12, 2015, a majority of the City Council adopted Resolution No. 150906, "declaring the Council's decision not to" pass the Petition's proposed ordinance. The resolution stated that this was the "final action of the city council within the meaning of ... Section 702 of the City Charter."

14. That on November 19, 2015, the Committee timely certified to the City that they required the Petition's proposed ordinance to be submitted to the voters in its original form.

15. That on November 24, 2015, the City sent the Committee a letter "verifying that the City will not place the petition submitted by the Committee of Petitioners ... on a ballot..."

16. That the MOU and contracts listed in paragraph 5 above all relate to a "Downtown convention center headquarters hotel" as defined in Relators' proposed ordinance.

17. That the contracts listed in paragraph 5 above were all contemplated by the MOU and negotiated pursuant to the MOU.

Conclusions of Law

The Court, after considering the pleadings filed, the evidence proffered and arguments of counsel, makes the following conclusions of law.

A. Pre-election review of Relators' proposed ordinance is proper in this matter

Relators seek an order in mandamus from this Court. "Mandamus is a discretionary writ, and there is no right to have the writ issued." *State ex rel. Missouri Growth Ass'n v. State Tax Comm'n*, 998 S.W.2d 786, 788 (Mo. 1999). "Mandamus will lie only when there is a clear, unequivocal, specific right to be enforced." *Id.* "Mandamus is only appropriate to require the performance of a ministerial act" and cannot be used to control the judgment or discretion of a public official. *Id.* Before granting a writ in mandamus, "the court will look to the public interest which may be concerned, and act in view of all the existing facts and with due regard to the consequences." *State ex rel. Cranfill v. Smith*, 48 S.W.2d 891, 892-3 (Mo. 1932). A writ in mandamus will be refused where, if granted, the act to be performed would be unlawful. *Id.*

Missouri courts recognize and follow a general rule against pre-election review concerning the substantive legality of ballot measures. *State ex rel. Hazelwood Yellow Ribbon*

Comm. V. Klos, 35 S.W.3d 457, 468 (Mo. 2000). As an election might result in the proposed measure being voted down, there is normally no justiciable controversy ripe for adjudication unless and until the measure is approved and becomes law. *Id.* There are at least two recognized exceptions to the general rule: judicial pre-election review is permissible and appropriate to allow a court to make a threshold determination of whether a proposed measure is administrative in character, rather than legislative; and judicial pre-election review is permissible and appropriate in cases where the measure is clearly facially unconstitutional. *Id.* A municipality will not be forced to place legislation that is unconstitutional on its face before voters. *Noel v. Board of Election*, 465 S.W.3d 88, 91 (Mo.App.E.D. 2015). Pre-election review of the facial constitutionality of an initiative petition is warranted given the “cost and energy expended relating to elections” and to “avoid public confusion generated by avoiding a speedy resolution of a question.” *City of Kansas City v. Chastain*, 420 S.W.3d 550, 554-55 (Mo. 2014). The movant is not entitled to a writ of mandamus to force an election on a law that would be unconstitutional or otherwise void if adopted. *Cranfill*, 48 S.W.2d at 893. This Court finds that Relators’ proposed ordinance is facially unconstitutional and as such judicial pre-election review is both permissible and appropriate in the above-captioned matter.

B. Relators’ proposed ordinance is facially unconstitutional

The Court finds that Relators’ proposed ordinance is facially unconstitutional for three separate and distinct reasons: Relators’ proposed ordinance is impermissibly vague; Relators’ proposed ordinance violates the Missouri Constitution, Article I, Section 13; and Relator’s proposed ordinance conflicts with the Real Property Tax Increment Allocation Redevelopment Act (“TIF Act”). The Court will address each of these grounds individually.

Relator's proposed ordinance is impermissibly vague and is therefore unconstitutional

“A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law” and is void. *Ferguson Police Officers Ass’n v. City of Ferguson*, 670 S.W.2d 921, 927 (Mo.App. 1984). The vagueness doctrine has two distinct bases: “first, it would be unfair to apply a law to a person who could not have determined in advance what conduct the law permitted and prohibited;” and “second, a vague law provides no standard to guide or restrict enforcement officials.” *State ex rel. Nixon v. Telco Directory Pub.*, 863 S.W.2d 596, 600 (Mo. banc 1993). The law must provide some guidance for enforcement officials and courts to lessen the possibility of arbitrary and discriminatory enforcement. *Id.*, see also *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). Although “impossible standards of specificity are not required,” one must be able to make some judgment as to whether or not a proposed activity is prohibited. *St. Louis County v. McBride & Son, Inc.*, 487 S.W.2d 878, 879 (Mo.App. 1972).

The United States Supreme Court established a sliding scale for measuring statutes against the due process clause. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982). The degree of vagueness allowed by the Constitution depends upon the nature of the enactment. *Id.* The Supreme Court has expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are less severe. *Id.* The Supreme Court held that the most important factor affecting the clarity demanded by the Constitution is whether a proposed law threatens to inhibit the exercise of constitutionally protected rights. *Id.* Relators admit that their proposed ordinance is criminal in nature, therefore

requiring this Court to impose a higher level of scrutiny in its determination of a violation of due process.

The Court finds that the Relators' proposed ordinance is impermissibly vague and is therefore void. Subsection (b) of the proposed ordinance defines the regulated activities as follows: "the City and any and all City officers, agents, and employees are prohibited from in any way causing or executing any agreement with any party to develop, finance, construct, or operate any downtown convention center headquarters hotel[...]". However, in subsection (d) the ordinance states, "[t]his section does not prohibit the planning necessary to appropriately make a decision to seek voter approval[...]". The Court finds the language of those two subsections to be impermissibly vague. How is a person to know what is allowed in terms of "appropriate planning?" On the other hand, how is a person to know what is disallowed by the language of "in any way causing an agreement?" The vagueness of those subsections, referring to those actions that are allowed or disallowed, provide insufficient notice regarding the scope of the ordinance and potentially requires persons to speculate as to its meaning. Additionally, those subsections provide insufficient direction for law enforcement as to what constitutes a violation of the ordinance. This lack of guidance increases the possibility of arbitrary and discriminatory enforcement.

Furthermore, the penalty provided in subsection (e) states, "[a]ny person who violates this section shall be guilty of an ordinance violation punishable by a fine of one thousand dollars (\$1,000). Each day on which a violation of this section occurs shall be a separate and distinct violation." What act creates a violation? Is it the action on the part of the representative of the city, extending an offer as part of an agreement? Is it the acceptance of the offer, thereby creating the agreement? Is it the execution of the agreement in written form? As stated above, the

wording of Relators' proposed ordinance fails to provide sufficient notice, requiring individuals to guess at its meaning as well as creating a potential for subjective interpretation and haphazard enforcement.

For the above reasons, the Court finds that Relator's proposed ordinance is impermissibly vague and is therefore unconstitutional.

Relators' proposed ordinance violates Mo. Const. Article I, Section 13 and is therefore unconstitutional

Article I, Section 13 of the Missouri Constitution provides that "no ex post facto law, nor law impairing the obligation of contract , or retrospective in its operation ... can be enacted." A retrospective law is one that impairs an existing vested civil right. *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 35 (Mo. 1982). Article I, Section 13 prohibits subsequent legislation from invalidating contracts that were lawful on the date of their making. *Id.* The City cannot impair its own contracts unilaterally by passing a new ordinance. *Lodge of the Ozarks, Inc. v. City of Branson*, 796 S.W.2d 646, 651 (Mo.Ct.App. 1990). "[C]ontracts made by the city, if authorized, are just like other contracts. They are measured by the same tests and subject to the same rights and liabilities. Provided they are of a kind municipal corporations can legally make, cities are bound by their own contracts in the same manner and to the same extent that natural persons and private corporations are bound by their agreements." *Id.* at 650.

The proposed ordinance seeks to repeal two ordinances related to the Approved Hotel Project. Those two existing ordinances authorized the execution of contracts related to the Project. With this authorization, the City lawfully entered into agreements with the developer and other parties for the development and financing of the Project. Regardless of the outcome, an

election, as required by the proposed ordinance¹ would delay the Approved Hotel Project and cause the City to be in breach of the Executed Agreements.

For the above reasons, the Court finds that the proposed ordinance violates Article I, Section 13 of the Missouri Constitution and is facially unconstitutional.

Relator's proposed ordinance conflicts with the Real Property Tax Increment Allocation Redevelopment Act ("TIF Act") and is therefore unconstitutional

The City is a constitutional charter city governed by Article VI, Section 19(a) of the Missouri Constitution. Article VI, Section 19(a) provides that a charter city shall have all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided that such powers are consistent with the constitution of the state and are not limited or denied either by the charter or by statute. An ordinance that conflicts with a state statute violates Article VI, Section 19(a) and is void. *Hazelwood*, 35 S.W.3d at 469. Sections 99.800 to 99.865 RSMo. establish the procedures a city is to follow before approving a redevelopment project which will use TIF financing. Section 99.835.3 RSMo. states:

Obligations issued pursuant to sections 99.800 to 99.865 may be issued in one or more series bearing interest at such rate or rates as the issuing body of the municipality shall determine by ordinance or resolution.

.....

No referendum approval of the electors shall be required as a condition to the issuance of obligations pursuant to sections 99.800 to 99.865.

Section 99.835.3 expressly prohibits voter approval of TIF obligations. Relators' proposed ordinance is inconsistent with the TIF Act and therefore unconstitutional as it violates Article VI, Section 19(a) of the Missouri Constitution.

¹ Relators' argue that an election is not required because the enforcement of the ordinance would be at the discretion of the city prosecutor. The Court does not find this argument compelling. It furthers the Court's concern that the proposed ordinance is impermissibly vague and will lead to arbitrary and haphazard enforcement.

Relators' proposed ordinance requires a vote on every proposed action to cause or execute any agreement to develop or finance a downtown convention hotel funded with tax increment financing. The proposed ordinance provides:

... "before any action is taken by the City or any City officer, agent, or employee to cause or execute any agreement with any party to develop, finance, construct, or operate any downtown convention center headquarters hotel, the proposed action must be presented to the voters of the City for their approval by a majority of those voting."

Relators' proposed ordinance defines a "downtown convention center headquarters hotel" as any hotel funded using any form of tax increment financing located near any convention center in Downtown Kansas City. The ordinance proposed requires a vote on every future action to cause or execute any agreement to develop, finance, construct, or operate any downtown hotel financed with TIF. The ordinance as proposed would require a vote before obligations are issued pursuant to Section 99.835.3 and is in violation of Art. VI, Section 19(a) of the Missouri Constitution.

The TIF Act further provides that plans and projects are approved by ordinance introduced in the governing body of the municipality. Mo. Rev. Stat. § 99.820.1(1). The TIF Act requires that the City Council have the discretion to choose whether to use TIF to finance a project and delegates to the City Council the authority to approve all related agreements. The Relators' proposed ordinance would prohibit what the TIF Act permits, and therefore is void and unconstitutional under Article VI, Section 19(a) of the Missouri Constitution.

The TIF Act permits the use of TIF financing to develop and finance any hotel near any convention center in downtown Kansas City without a public election – an act that the Relators' proposed ordinance attempts to prohibit. The TIF Act grants the City full discretion in deciding how to use a TIF plan. Under the Relators' proposed ordinance, a TIF plan may only be used if

authorized by voters. The requirement of an election is inconsistent with the plain language of the TIF Act and the Relators' proposed ordinance is therefore unconstitutional.

The Court rejects Relators' argument that the proposed ordinance merely adds a requirement to a state statute. Relators' proposed ordinance seeks to add an election requirement for use of TIF funds. Currently, there is no election requirement in the TIF Act; it is actually the opposite – the TIF Act expressly prohibits an election requirement. Relators are attempting to impose an election requirement where none exists and disrupts the City Council's legislative authority as granted by statute. The proposed ordinance is contrary to the plain language of the statute and as a result, the proposed ordinance is unconstitutional.

Conclusion and Judgment

For the above-stated reasons, the Court finds that Relators' proposed ordinance is facially unconstitutional for three separate and distinct reasons, each of which are a sufficient ground for the denial of Relators' writ in mandamus: Relators' proposed ordinance is impermissibly vague; Relators' proposed ordinance violates the Missouri Constitution, Article I, Section 13; and Relator's proposed ordinance conflicts with the Real Property Tax Increment Allocation Redevelopment Act ("TIF Act"). The Court, being fully advised of the premises, hereby enters the following judgment in accordance with its findings above:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Relators' Petition for Writ of Mandamus is **DENIED**.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Court's December 16, 2015 Preliminary Order in Mandamus is hereby quashed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Relators' Petition for Writ of Mandamus is dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that court costs are assessed against Relators.

IT IS SO ORDERED.

Dated: 11-Feb-2016



Judge Jennifer M. Phillips

CERTIFICATE OF MAILING

It is hereby certified that copies of the foregoing were sent through the e-filing system this 11th day of February, 2016, to the following:

JONATHAN STERNBERG
SARAH BAXTER
JOHN M KILROY, JR
PHILLIP JAMES RICHARD ZEECK



Law Clerk